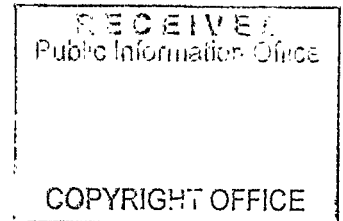


**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.**



In the Matter of:

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and "Preexisting"
Subscription Services (SDARS III)

Docket No. 16-CRB-0001-SR/PSSR
(2018-2022)

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Congressional Copyright Royalty Board

**MUSIC CHOICE'S OPPOSITION TO SOUNDEXCHANGE'S MOTION TO COMPEL
THE SERVICES' PRODUCTION OF CERTAIN DOCUMENTS**

Music Choice submits this opposition to SoundExchange's August 22, 2016 Motion to Compel the Services' Production of Certain Documents (the "Motion"). SoundExchange's Motion purports to seek an order from the Judges compelling Music Choice to produce documents. Yet the Motion is wholly devoid of any specific allegation or argument that Music Choice has improperly withheld a single document. Nor does the Motion identify any actual dispute between SoundExchange and Music Choice. Such a "motion" is no motion at all. Rather, after acknowledging that (1) the parties had actually resolved any discovery issues during the meet and confer process; (2) SoundExchange and Music Choice had even agreed to make their document productions on the same day; and (3) it "does not doubt that the Services [including Music Choice] will honor their commitments to produce the documents," SoundExchange nonetheless filed the Motion against Music Choice, supposedly "to ensure that it receives the documents it has been promised." Motion at 6. SoundExchange's filing of the Motion, where there was no actual dispute between it and Music Choice, was wholly improper, invalid, an abuse of process, and must be denied for failure to raise any justiciable issue.

But SoundExchange's bad faith conduct did not end with filing this frivolous non-motion. Music Choice did, in fact, produce its documents as promised, within minutes of receiving service of the Motion. Having fulfilled its promise, Music Choice requested that SoundExchange withdraw the Motion as against Music Choice, so that it would not have to waste time and money filing an opposition. SoundExchange refused, claiming it needed to review all of Music Choice's documents before it could determine whether a withdrawal was appropriate. Of course, this position makes no sense. No substantive issue is presented in the Motion regarding Music Choice's production. Even if SoundExchange deemed Music Choice's production inadequate, and even if that inadequacy could not be cured through good faith negotiations, SoundExchange would have to file a new motion specifying what specific dispute required resolution by the Judges. The only possible reason for SoundExchange to refuse to withdraw the Motion is to harass Music Choice and drive up its litigation costs. This is another example of SoundExchange's abuse of the litigation process to leverage the financial resources of an entire industry against Music Choice, a relatively small company of modest means.

BACKGROUND

At 6:28 p.m. EDT on August 22, 2016, the last day of the preliminary discovery period in this proceeding, SoundExchange served its Motion. The bulk of the Motion pertains solely to a dispute regarding negotiating documents related to Sirius XM's direct license program and has nothing to do with Music Choice. *See* Motion at 2-5. The remainder of the Motion relates to documents that SoundExchange acknowledges Music Choice "agreed to produce" and "intend[ed] to produce"—and which Music Choice in fact did produce, at 6:49 P.M. that same day. Motion at 6; Declaration of John Sullivan ("Sullivan Decl.") ¶¶ 5-6 & Ex. A. Even though SoundExchange "d[id] not doubt that the Services [including Music Choice] w[ould] honor their

commitments to produce the documents,” it nevertheless filed this Motion to “protect its rights and to ensure that it receives the documents it has been promised.” Motion at 6.

Seeking to avoid unnecessary effort and expense, counsel for Music Choice emailed counsel for SoundExchange on August 23 to request that SoundExchange agree by the end of the following business day to withdraw the Motion as to Music Choice in light of Music Choice’s production of documents on August 22. *See* Sullivan Decl. ¶ 7 & Ex. B. Counsel for SoundExchange responded that they had received Music Choice’s production of over 16,000 pages of documents, as well as Sirius XM’s production, but would not agree to withdraw the Motion promptly because they would not be able to review all of the documents in time. *See* Sullivan Decl. ¶ 7 & Ex. B. Because the Motion remains pending, Music Choice had no option but to file this opposition to avoid any potential consequences of leaving the Motion unopposed.

ARGUMENT

This Motion is just the latest example of SoundExchange’s abuse of the Copyright Royalty Board litigation process to harass a relatively small business, which has modest resources compared to SoundExchange and the entire recording industry it represents. Every five years, Music Choice is thrust onto the horns of a dilemma: whether to spend millions of dollars on these enormously expensive proceedings in the hope of at least keeping its royalty rates manageable, or else cave in to the one-way ratchet of SoundExchange’s exorbitant settlement demands. Even though, after several such rate periods, SoundExchange has repeatedly failed to drive Music Choice’s rate up to the absurd levels it routinely seeks in these proceedings, SoundExchange continues to demand massive rate increases that would drive Music Choice out of business as a precondition of settlement, leaving Music Choice with no choice but to litigate.

It makes little difference to SoundExchange. The royalties Music Choice pays are barely a drop in the ocean of all the royalties SoundExchange receives and do not even amount to a rounding error in the ledgers of the various record companies that receive those royalties; and given that SoundExchange inevitably litigates against SiriusXM in the same proceedings, its incremental costs to proceed simultaneously against Music Choice are relatively modest and may be spread among the entire recording industry. So from SoundExchange's perspective, it has little incentive to settle. But for Music Choice, it is a matter of life or death, of keeping the world's first and oldest digital music company afloat or closing up shop. Music Choice reached the point some time ago where the cumulative costs of accepting further rate increase settlements were untenable, and every game SoundExchange plays, every time it stalls or creates needless motion practice,¹ adds to the already substantial burden Music Choice bears by participating in these proceedings.

SoundExchange's current Motion is a perfect example of its abusive approach to these proceedings. It expressly acknowledges that the preliminary discovery period was not yet over, that Music Choice had agreed to produce documents, that Music Choice intended to make a production of those documents that same day (and the same day that SoundExchange itself intended to produce documents), and that SoundExchange did not doubt that Music Choice would in fact do so. *See* Motion at 6. Yet despite taking the position that discovery cannot be compelled during the preliminary discovery period, and that no documents need be produced

¹ *See, e.g.*, Aug. 23, 2016 Order Granting in Part and Denying in Part Services' Motion to Set Specific Discovery Deadlines and Compel Copyright Owner Participants' Adherence to Their Discovery Obligations at 3 (holding that the Protective Order in this proceeding "unambiguously prohibits the Opposing Parties from withholding from production otherwise discoverable agreements"), 7 & n.6 (recognizing that, contrary to SoundExchange's position, it would be impossible for a record label itself, as an inchoate entity, to serve on a board of directors).

until the end of that discovery period, SoundExchange filed the Motion anyway. The Motion does not even contain any actual argument to which Music Choice could respond; it does not (nor could it) identify any problem with Music Choice's production or take issue with any of Music Choice's objections and responses to SoundExchange's discovery requests. If SoundExchange discovers some such issue and the parties are unable to resolve it informally, SoundExchange cannot rely on this "placeholder" Motion, but will have to file another motion actually laying out the issue to be resolved. Notwithstanding all of this, and even though Music Choice did in fact produce the documents as promised—a mere 21 minutes after SoundExchange served its Motion—SoundExchange refused to withdraw its pointless, empty Motion.

CONCLUSION

Music Choice respectfully requests that the Judges deny the Motion as against Music Choice.

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Dated: August 29, 2016

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